U.S. Department of Labor Board of Alien Labor Certification Appeals
800 K Street, N.W.
Washington, D.C. 20001-8002

Date: December 29, 1997

Case No.: 95-INA-00362

In the Matter of:

GLOBAL DATA SUPPLY,
Employer

On Behalf Of:

JACKIE CHEUNG MAU KIN,
Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On December 17, 1992, Puzar Enterprises, Inc., d/b/a Global Data Supply ("Employer") filed an application for labor certification to enable Jackie Cheung Mau Kin ("Alien") to fill the position of Domestic and International Salesman (AF 25-26).[2] The job duties for the position are:

> Generate new domestic customers. Both inside & outside domestic sales. Provide engineering support. Direct Asian import / export division. Including: marketing, negotiations, L/C's, translations. *Mental: Sales pressure. *Physical: Telephone, car, computer. 75% sales methods are done over the phone. Knowledge of product is key. Overall purpose of job is to generate sales, to make a profit, to provide employment to the community, to make a small business grow, to pay taxes.

The requirements for the position are four years of high school, two years of college, and four years of experience in the job offered or as a Marketing Manager, Communication Products. Employer's other special requirements were "Fluent in English, Chinese with diolect [sic] of Cantanise [sic] & Mandiran [sic]. Exp. In import & export. Knowledge of the Hong Kong markets, factories, & contacts."

The CO issued a Notice of Findings on August 12, 1994 (AF 21-23), proposing to deny certification on the grounds that the Employer failed to post an adequate notice of job opportunity. The CO found that the Employer's submitted notice of job opportunity does not comply with the regulations at 20 C.F.R. § 656.20(g) because it does not advise applicants to apply directly with the Employer, nor does it state that any person may provide information bearing on the labor certification application to EDD and/or to DOL.

Accordingly, the Employer was notified that it had until September 16, 1994, to rebut the findings or to cure the defects noted.

In its rebuttal, dated September 12, 1994 (AF 16-20), the Employer contended that a correct notice of job opportunity was posted from December 7, 1993, for 30 days but that,

> On March 24, 1994, Mr. R. Torres, an Alien Labor Certification Specialist, wrote to me and stated that my previous posting was incorrect. He told me by telephone

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

[2] By letter dated August 17, 1993, the Employer amended the labor certification application to reflect wages of $21.68 per hour, to delete the training requirement, to substitute four years of experience instead of ten (10), and to delete "English" as the Major Field of Study.

> that I should not include our business address for applicants. I rewrote the job opportunity notice and again posted the notice on the company lunch room bulletin board. This was posted from April 1st through April 15, 1994, again beyond the required time (copy enclosed). If Global Data Supply was to add our address for applicants, then the first posting should have been accepted. (Emphasis in original.)

The Employer stated that he will again post the job opportunity from September 12th through September 30, 1994, and enclosed a copy of the new job opportunity notice dated September 12, 1994, with his rebuttal.

The CO issued the Final Determination on September 21, 1994 (AF 13-15), denying certification because the Employer failed to comply with the posting requirements at 20 C.F.R. § 656.20(g).

On October 17, 1994, the Employer requested review of the Denial of Labor Certification (AF 1-12). In March 1995, the CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

Section 656.20(g)(3) states the following:

> Any notice of the filing of an Application for Alien Employment Certification shall:
> (i) state that applicants should report to the employer, not to the local Employment Service office;
> (ii) state that the notice is being provided as a result of the filing of an application for permanent alien labor certification; and,
> (iii) state that any person may provide documentary evidence bearing on the application to the local Employment Service Office and/or the regional Certifying Officer of the Department of Labor.

In accordance with this regulation, the CO, in the NOF, informed the Employer that its notice failed to advise applicants to apply directly to the Employer (AF 22). Moreover, the CO found that the notice did not state that any person may provide information bearing on the labor certification application to the Employment Service Office and/or the Department of Labor. As such, the CO instructed the Employer to revise and repost the notice. In addition, the CO notified the Employer that it must return a copy of the notice, as well as a statement regarding the dates posted, the number of responses received, interviews given and the specific lawful, job-related reasons for rejecting each U.S. worker (AF 23).

In rebuttal, the Employer explained that his previous posting was incorrect because an Alien Labor Certification Specialist informed him that he should not include the business address for applicants (AF 16). The Employer further stated that he would post the notice in accordance with the CO's specifications.

In the Final Determination, the CO denied certification because the Employer failed to comply with the instructions given in the NOF (AF 15). Specifically, the CO noted that the Employer had not yet reposted the job notice and, therefore, did not submit his recruitment results. We agree with the CO. The Employer was notified in the NOF that it should rebut with a statement indicating the "number of responses received, interviews given and the specific lawful job-related reasons for rejecting each U.S. worker." (AF 23). Therefore, the Employer was aware that it was necessary to post the job notice prior to filing the rebuttal, which was due on September 16, 1994. Furthermore, the Employer was clearly informed that:

> All deficiencies must be corrected or rebutted by the date specified on the transmittal sheet. If additional time is needed, an extension request must be submitted by the employer . . ..

(AF 23). Therefore, if the Employer could not fulfill the CO's requirements by the September 16, 1994, deadline, he should have requested an extension of time or offered some explanation in his rebuttal for failing to meet the deadline. Instead, he waited 30 days until September 12, 1994, and submitted his rebuttal which indicated he would be posting a new notice (dated September 16, 1994). Thus, it is the Employer's failure to take timely action to rebut the NOF which is fatal to the application.

Moreover, even if the Employer was incorrectly informed as to the requirements for posting a job notice on a prior occasion (by the state agency), he was clearly notified in the NOF of the proper requirements, and was given clear instructions as to how to comply. Therefore, we find that the Employer has failed to rebut the findings in the NOF. Accordingly, the Employer has not complied with the requirements of §656.20(g)(3) and the CO's denial of certification is hereby AFFIRMED.[3]

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.
For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary

[3] In its Request for Review, the Employer argued that the NOF gave him a choice of rebutting the findings contained therein or remedying the defects (AF 1). However, we are not persuaded by this argument as the NOF was clear in notifying the Employer that he must repost the job notice and provide the results of his recruitment efforts (AF 22-23).

to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.